

**SOAH DOCKET NO. 582-10-4184  
TCEQ DOCKET NO. 2005-1490-WR**

**APPLICATION BY THE BRAZOS RIVER AUTHORITY FOR WATER USE PERMIT NO. 5851      §      BEFORE THE STATE OFFICE OF  
   §      ADMINISTRATIVE HEARINGS**

**FRIENDS OF THE BRAZOS RIVER, H. JANE VAUGHN, LAWRENCE D. WILSON, MARY LEE LILLY, KEN W. HACKETT, AND  
BRAZOS RIVER ALLIANCE’S BRIEF IN RESPONSE TO  
CERTIFIED QUESTIONS**

TO THE HONORABLE COMMISSIONERS:

COME NOW, Friends of the Brazos River, H. Jane Vaughn, Lawrence D. Wilson, Mary Lee Lilly, Ken W. Hackett, and Brazos River Alliance (collectively “Protestants”) and submit this their opposition to the need for Certified Questions in this proceeding, and, in support thereof, would respectively show the following:

**SUMMARY**

Protestants urge the Commission not to accept the certified questions, but instead resolve the current inconvenience that has led to the filing of the Certified Questions with a relaxation of the hearing schedule. The issues raised in the Certified Questions do not need to be addressed, nor should they through this process. Addressing them would require a rulemaking process, not the certified question process.

**ARGUMENT**

1. Background:

When the Commission issued its order on January 30, 2012, allowing BRA to file a Water Management Plan and remanding this matter to SOAH, it indicated that it intended that TCEQ staff and SOAH proceed expeditiously. They did.

The Commission did not at that time, however, anticipate the potential delay that would be needed with adoption of the SB 3 environmental flow standards for the Brazos River. Neither TCEQ staff nor BRA advised the Commission that the expedited hearing process might be complicated by the SB 3 rule making process. Protestants did not realize that this could occur and thus did not raise it either.

Thus, TCEQ staff and BRA worked on the Water Management Plan and new drafts of the SysOp permit without regard to the recommendations for the Brazos River Basin developed under the SB 3 process. Now the rules to create an environmental flow standard for the Brazos are pending and timed to be final before the current permit proceeding is completed.

## 2. Arguments:

Protestants adopt the legal arguments presented in the National Wildlife Federation Brief in Response to the Certified Questions, with one exception. Protestants agree with NWF's legal interpretations and arguments. Protestants do not, however, support NWF's proposal for a transitional rule. Protestants believe this approach would require additional hearings and costs for Protestants at a later date on a matter that can be addressed now. Protestants prefer that the matter be resolved in the current hearing process in the same fashion as it has been for all other basins with SB 3 flow standards.

Protestants agree with NWF that the law is clear and that the new environmental flows standards must apply to pending applications, such as BRA's application. Thus, Protestants urge the Commission to provide clear guidance that the hearing process should take the time needed for inclusion of the new standards into the permit. The ALJ's should

be freed from the directive to move the process along on a faster schedule. They should be directed to provide BRA, TCEQ staff and all other parties the time needed modeling and other evaluations of impacts of proposed appropriations and permit condition on the protected environmental flows, downstream water right holders, etc.

Protestants fear that the alternative would be a contested case hearing with a PFD that then would put the Commissioners again in a position of denying the SysOp permit or remanding the matter again for incorporation of the final flow standards into the permit.

The more efficient process is one that allows all requirements for permit issuance to be addressed in the current proceeding.

Such a process will require additional time and work, but the work will be required of BRA and the ED at some time in any case. Moreover, the additional time is not significant in comparison to the 9 years already involved with the application. BRA filed its application in 2004 and chose to do so without a WMP and in a fashion that has forced TCEQ to take many extra months to process the application and the additional time for the current remand.

## **CONCLUSION**

When BRA filed its application in 2004, the legislature was working on a process to provide protection for environmental flows. Whether BRA sought to get a permit before that process was completed for the Brazos River and should, therefore, be treated as an exception is not the issue. BRA has not taken the steps needed to obtain a decision on its application before the standards will be final. These final SB 3 standards must be included in a permit, if one is issued, in this proceeding.

Protestants urge the Commission not to accept or answer the Certified Questions, but, instead, direct the ALJs to provide for the time needed in the hearing process to incorporate the final environmental flows standards into the evaluation of the BRA SysOp application.

Respectfully submitted,

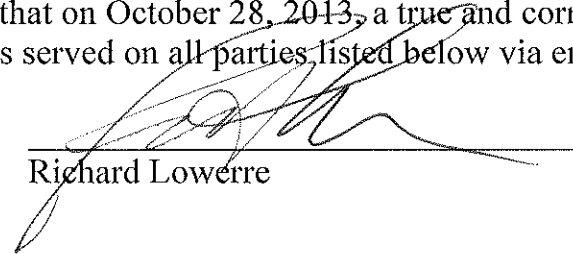


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### **CERTIFICATE OF SERVICE**

I hereby certify by my signature below that on October 28, 2013, a true and correct copy of the above and foregoing document was served on all parties listed below via email and/or by deposit in the United States Mail.



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